The Court could not accept his cautioned statement as true and reject his testimony as false. The Accused might not be telling the truth in his cautioned statement. The Accused probably was telling the truth in Court particularly in the following material particulars:

(1) PW7, the owner of the motorcycle could not remember the date he left his motorcycle at his employer's house but nevertheless he was away for three days. It is probable therefore that the motorcycle was left there for three days and others had used it before the Accused used it that morning.
(2) The Accused's explanation that he did not check the content of the black plastic bag on the carrier of the motorcycle seemed reasonable. There was nothing inherently suspicious about it that he should check its content. But he admitted that he took care of the bag in the sense that he kept the motorcycle within sight when he had his breakfast. An imputation of knowledge of the drug is misconceived.
(3) The accused did not behave in any way suggestive of knowledge of the drug contained in the bag. If he indeed struggled to free himself which he denied, it was not unusual as he was dragged by the arm by unidentified persons.
(4) The prosecutor's assailable cross-examination was answered with fairly reasonable answers and explanations as to why he did not leave the plastic bag at the house or with the children, why he used the motorcycle and where he went that morning and which road he proceeded on and why.
(5) The Accused denied knowledge of the raw opium contained in the plastic bag both in his testimony in Court and also in his cautioned statement and this was not substantively challenged by the prosecution.

Having considered the defence in its totality the Court found that the defence had rebutted on the balance of probabilities the presumption that the accused knew that the contents of the plastic bag which was found under his control and custody was raw opium and that on a balance of probabilities he had rebutted the presumption that he was trafficking in raw opium.

Thereupon the Court acquitted and discharged the Accused of the charge.

PUBLIC PROSECUTOR

v.

SAW KOK LEONG

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL TRIAL NO. 47(58)-46-88]
20 JULY 1993

DANGEROUS DRUGS: Charge of trafficking in heroin - Submission of no case to answer - Whether there was a break in the chain of handling of the drug exhibits.

CRIMINAL LAW & PROCEDURE: Exculpatory cautioned statement - Whether contents of cautioned statement could be used in submission of no case to answer - Whether contents of cautioned statement could serve to rebut statutory presumptions arising under s. 37(d) & (da) Dangerous Drugs Act 1952.

The accused was charged with trafficking in heroin contrary to the provisions of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). At the close of the case for the prosecution, in a submission of no case to answer, Counsel for the accused sought to use the cautioned statement of the accused which was wholly exculpatory in nature. Counsel further contended that there was a break in the chain of handling of the offending drug exhibits it being common ground that the drug exhibits were not marked in any manner by any of the prosecution witnesses.

Held:

[1] It was impermissible to ground the submission of no case to answer on the cautioned statement, it being a voluntary out of Court statement by the accused which could not by itself serve to rebut a statutory presumption. Thus the cautioned statement should not be made the foundation of an order of acquittal especially at the close of the case for the prosecution since such statements could not be tested by cross-examination until the defence has been called.

[2] The drug exhibits were kept in a very cavalier manner thus permitting accessibility to persons other than the storekeeper on duty. However the fact that the exhibits were sealed with four Jabatan Kimia seals, at least three of which were virtually intact, was satisfactory evidence that the exhibits had not been tampered with duing the material period.

[3] The non-marking or non-initialling of the drug exhibits was not by itself fatal to the

prosecution case if the same is accounted for and securely kept. However where there are no markings or initials to give the offending items an identity of its own, the Court must examine and be satisfied beyond doubt that there is not even a single gap in the chain of handling of the offending item.

[4] In a capital charge it is unsafe to allow the identity of the drug exhibits to be established through a process of linkage or by close association. On the contrary the drug exhibits themselves ought to be marked and sealed unless such default is negated by satisfactorily showing that strict conditions as to their handling at every stage has been fulfilled.

[5] It was not permissible for the Court to presume that PW11 replaced the drug exhibits back into his cabinet and locked them soon or immediately after the photography session by PW2. Such presumptions are no substitute for clear, direct and positive evidence of the exhibits' safe custody, *a fortiori* in a capital charge.

[6] Based on the evidence there was a serious gap in the chain of handling of the drug exhibits produced in Court. The prosecution had therefore failed to establish a *prima facie* case against the accused which, if unrebutted, would warrant his conviction.

[Accused acquitted and discharged without being called to enter upon his defence].

Cases referred to:
PP v. Lin Lian Chen [1990] 2 CLJ 1020 ***(refd)***
PP v. Adetunji Adelaye Sule [1993] 3 CLJ 113 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086 / [1992] 1 AMR 46:253 / [1992] 2 MLJ 561 ***(refd)***
Tong Peng Hong v. PP [1955] 21 MLJ 232 ***(refd)***
Teoh Hoe Chye v. PP [1987] 1 MLJ 220 ***(refd)***
PP v. Peter Yeoh [1993] 1 CLJ 78 ***(refd)***
PP v. Tan Ah Huat [1993] 4 CLJ 88 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B(1)(a), (2)

For the accused - S. Asamaley; M/s. S. Asamaley & Co.
For the public prosecutor - Salim bin Soib @ Hamid, DPP

JUDGMENT

Vincent Ng Kim Khoay JC:

The Accused was charged as follows:

> Bahawa kamu pada 6 Februari 1987, jam lebih kurang 9.30 malam di Pengkalan Raja Tun Uda dalam Daerah Georgetown, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya, iaitu heroin seberat 122.6 gram dan oleh itu kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

The following evidence was led by the prosecution from Corporal Mohd Yunus bin Ismail (PW3), one of the main prosecution witnesses against the accused.

On 6 February 1987 at about 9.30 p.m., while PW3 was in the police pondok at Pengkalan Raja Tun Ude, in charge of beat duty, he saw DPC Mohd Sidek bin Ali (who was then in plainclothes) stop a Chinese male just as he entered the lane on the top floor for passenger boarding of the ferry. DPC Mohd Sidek bin Ali (Mohd Sidek) had since died. At that time Constable Jubaidi bin Mohd. Daud (PW4) was with PW3 and was in police uniform. The Chinese male was identified as the accused.

At the time the accused was stopped by Mohd Sidek, he was carrying a red travelling bag (P9) in his right hand. Mohd Sidek then showed something to the accused and immediately took possession of P9 from the hand of the accused. Then, Mohd Sidek together with PW4 accompanied the accused out of the said passenger ferry boarding lane towards the police pondok. As they emerged from the lane, the accused took to his heels and ran towards the direction of Jalan Weld Quay. Mohd Sidek then threw P9 to PW4 to guard same and gave chase.

PW3 also gave chase and caught the accused near the Kwong Yit Poh building, when the latter was running across Lebuh Gat Chulia to enter Lebuh Victoria. PW3 immediately handcuffed the accused and brought him back to the police pondok where PW4 was waiting with P9. Therein, the person of the accused and P9 were searched. Nothing incriminating was found on the person of the accused, but in P9, they found a face towel (P12), a track suit (P11), a man's brief (P13), a comb (P14A), a tube of Colgate tooth paste (P14B), a tooth brush (P14D), two boxes of matches (P14C), a ball pen (P14E) and a large bathing towel (P10), rolled within which were two plastic packets (Exh. P4A and P5A contents being inclusive) each wrapped in Chinese newspaper. P4A and P5A contained a quantity of a granular substance, orange in colour, and suspected to be heroin. PW3 then lodged Lebuh Pantai Police Report No. 302/87 on the arrest of the accused.

The evidence of PW3 was corroborated by the testimony of PW4 in all material particulars of the incident.

The government chemist Ng Hock Sing (PW1) analysed P4A and P5A, which contained a total gross weight of 450 grams, and found both the two packets to contain a total net weight of 122.6 grams of heroin. He also stated that heroin is a dangerous drug as defined under the Dangerous Drugs Act.

In Counsel's submission of no case to answer after the close of the prosecution case he had, apparently not without valid reasons, attempted to make heavy weather of the cautioned statement of the accused (D20) which was exculpatory in nature. His reason being that from the evidence of PW11, the following details were gleaned.

The accused took the Investigating Officer (PW11) together with a few other officers to the residence of one Ah Kong, later identified as Tan Beng Huat, at address No. 536 R Jalan Abdullah Ariff at about 2.45 a.m. on the morning following the night of his arrest. Tan Beng Huat had tried to escape through the balcony of the said house when the raiding party arrived. Tan Beng Huat was in fact charged together with the accused on 20 February 1987 and was detained in Penang jail until 9 October 1987 when he was released and his whereabouts is now unknown. The international passport of Tan Beng Huat showed that he was a frequent traveller to Thailand whereas the accused only had a restricted passport for entry into Singapore and his last exit from Singapore was 21 September 1984, according to this restricted passport. The wrapper of the soap seized from the said premises of Tan Beng Huat (shown in D15J) bears the same name and address in Thailand as the red match box in P14C which was one of the contents of P9. PW11 confirmed that the track suit (being P11, a top jacket) did not fit the accused but fitted Tan Beng Huat. On account of this, PW11's prime suspect was Tan Beng Huat. He also said from his investigations the red bag (P9) and its contents may have belonged to Tan Beng Huat.

Counsel had also intended to submit that there were striking similarities between certain statements in D20 and the cautioned statement which was also recorded from Tan Beng Huat, being as follows:

(a) In D20 the accused stated that it was Tan Beng Huat who took the accused in a taxi number 234 to the jetty (the scene of the crime) on the night of his arrest.

(b) Tan Beng Huat in his cautioned statement stated that he worked as a taxi driver and confirmed that he took the accused to the jetty in taxi No. HP 234.

D20 was exculpatory in nature and must have laid the blame for the offence squarely on the shoulders of Tan Beng Huat. The case of *PP v. Lin Lian Chen* [1990] 2 CLJ 1020 was submitted by Mr. Asamaley as his basis for his contention that even at this stage, D20 could be considered to show whether its contents could probably or reasonably be true.

The Court has to be mindful that at this stage, no explanation could be or was forthcoming from the accused as to why he ran away from Mohd Sidek (deceased) and PW4 when they first confronted him.

I held that it is impermissible to ground the submission of the defence on D20 by virtue of the recent Supreme Court decision in the case of *PP v. Adetunji Adelaye Sule* [1993] 3 CLJ 113. Therein it was held that a voluntary out of court statement by the accused - which includes a cautioned statement - could not by itself serve to rebut a statutory presumption, and thus, should not be made the foundation of an order of acquittal especially at the close of the case for the prosecution, since such statements could not be tested by cross-examination until the defence has been called.

The question then posed by the learned Counsel to the Court is whether the Supreme Court's decision in *Adetunji* had gone against the grain of the decision by the same Court in *PP v. Lin Lian Chen* [1992] 2 AMR 46:253; [1992] 2 MLJ 561. My answer to this is in the negative.

In affirming the High Court's decision in *Lin Lian Chen* (supra), Edgar Joseph Jr. SCJ had said as follows:

> If, subject to the consideration of privilege, the defence is entitled - and we consider it plainly is - to elicit by cross examination of prosecution witness, oral evidence, which goes either to destroy the case for the prosecution, or to support its own case, we fail to see why, it may not elicit, in the same way, documentry evidence, **for the same purpose**, (emphasis supplied) as we see no distinction in principle between the two situations.

In that case the documentary evidence elicited at the stage of the prosecution case by the

defence was the cautioned statement (D22) which, together with other cogent evidence, was given substantial consideration by the learned Judge when he decided not to call the accused to enter upon his defence.

In order to determine whether the Supreme Court's respective *ratio decidendi* in *Adetunji* and *Lin Lian Chen* ran counter to each other, it is important to examine the distinguishable facts and issues obtaining in both the cases at the trial stage.

In *Lin Lian Chen* (supra), the drug heroin was found on the foot well of the left rear seat, the console box and on the dashboard of a car driven by the accused and not in any specially constructed or secret compartment of the car. Whereas, in *Adentuji,* not only the offending drug exhibit heroin was found in the aluminium trunk that the accused was carrying but same were concealed in a double layered secret compartment located at the bottom of the trunk.

The proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v. PP* [1955] 21 MLJ 232 is that a car does not *ipso facto* fall within the words "... anything whatsoever containing the drugs" and it thereby does not attract the presumption under s. 37(d) of the Dangerous Drugs Act. It would have been otherwise if the drugs were found concealed in a specially constructed or secret compartment of the car. Whereas, it is trite law that a bag or baggage - and this would include an aluminium trunk - with or without a specially constructed or secret compartment would clearly fall within the phrase "... anything whatsoever containing ..." in s. 37(d) of the Act.

As such, at the close of the case for the prosecution, the statutory presumptions under s. 37(d) and (da) had been successfully raised by the prosecution in *Adetunji* but not in *Lin Lian Chen* (supra). A statutory presumption is a presumption of adverse positive effect on the accused which placed on the latter's shoulder an onus to affirmatively discharge. This being the case, the Supreme Court is correct in holding in *Adetunji,* that once the statutory presumption has arisen - it is untenable that a cautioned statement, however exculpatory, could, without other cogent evidence found sufficient basis to discharge such onus, since at that stage, the accused had not given evidence himself and his explanations could not be tested by cross-examination.

Whereas, in *Lin Lian Chen,* not only no statutory presumptions under s. 37(d) had been raised, but there were also other cogent evidence appearing in the case for the prosecution which went to show that the explanation in the cautioned statement as to the circumstances whereby the accused knew nothing of the offending drug exhibits, could reasonably and probably be true. Such consideration by the Court to arrive at a decision to acquit the accused upon the "reasonable and probable" test, is permissible even at the close of the prosecution case, due to the absence of any presumptions raised by the prosecution.

In precluding Counsel from submitting on the contents of D20 at this stage, I was not amiss on the law as it ought to be noted that in *Lin Lian Chen* (supra) the prosecution has relied solely on circumstantial evidence whereas in our current case the prosecution had successfully raised the presumptions under s. 37(d) and (da) at the close of its case.

In the event, the only issue raised by Counsel in his submission of no case to answer concerns the break in the chain of handling of the offending drug exhibits P4A and P5A. As it is common ground that the drug exhibits P4A and P5A were not marked in any manner by any of the prosecution witnesses, their identities were sought to be impugned at the following stages:

(i) Before the drug exhibits were handed to PW11 (the I.O.) at 11.35 p.m., on the night of the accused's arrest, these exhibits were with PW3, PW4 and Sidek (deceased), that is, during the period from its seizure at 9.30 p.m. to its handing over at 11.35 p.m. On this point, I hold that it was only PW3 who, to the satisfaction of the Court, had held continuous custody and guarded P4A and P5A during this period, though PW11 had said that there was also another officer present when he was asked why these items were not dusted for fingerprints.

(ii) When the storekeeper (PW7) took over from the previous storekeeper (PW6) the latter was no more there. PW7 had to look for the keys which he found in an unlocked drawer. PW7 did not know how long the keys were left in the drawer and whether anyone had used them before. See *Teoh Hoe Chye v. PP* [1987] 1 MLJ 220. According to Counsel, this issue should be considered in conjunction with the evidence of PW11 who

said that some of the seals were cracked and did not appear wholesome when he received P3 (the envelope) on 5 May 1993 to be brought to Court for the purpose of this trial. Although, I agree with Counsel that the exhibits P4A and P5A were kept (at least at the stage when PW7 took over as storekeeper) in a very cavalier manner, thus permitting accessibility to persons other than the storekeeper on duty, yet, by virtue of the fact that at this stage of negligent handling of the drug exhibits, the same were sealed with the Jabatan Kimia seal and - according to the Court's own observation - at least three of the four seals were still virtually intact, the Court is satisfied that the exhibits and had not been tempered with during this material period.

(iii) Lastly, it was submitted that there was a break in the handling of the exhibits P4A and P5A during the period after same were handed by PW3 to PW11 at 11.35 p.m. on 6 February 1987, as the brown envelope (P3) containing P4A and P5A were not sealed by PW11 until 2.00 p.m. on 11 February 1987. I found that although the exhibits P4A and P5A were entered into P3 at the time PW11 received same and kept locked in his cabinet, he did not seal P3 until 2.00 p.m. on 11 February 1987.

I had also in my earlier decision (see *PP v. Peter Yeoh* [1993] 1 CLJ 78 stated that the non-sealing of the drug exhibits is by itself not fatal to the prosecution case and indeed in my later decision in *PP v. Tan Ah Huat* [1993] 4 CLJ 88 when the defence was called I had also held that the non-marking or non-initialling of the drug exhibits is by itself not fatal to the prosecution case, if the Court is satisfied that at every stage of the handing of the drug exhibit, the same is accounted for and is securely kept. However, where there are no markings or initials to give the offending items an identity of its own, the Court must examine with special care, in order to be satisfied beyond doubt (even at the stage of close of the prosecution case), that there is not even a single serious gap in the chain of handling the offending item. This gap would, upon the established authorities, be fatal to the prosecution case.

It is this Court's finding, after careful consideration of PW11's evidence, that though the exhibits P4A and P5A were kept in an envelope (P3) and placed in a locked cabinet, the same in P3 remained unsealed for about 4 $^1/_2$ days that is until 2.00 p.m. on 11 February 1987. Though PW11 had said that the cabinet was locked, yet on 8 February 1987 (time not stated) he took the drug exhibits to enable PW2 to take the photographs P6A to E. Though the witness further stated that he was present when the photos were taken, no evidence was led from him as to what he did with P4A and P5A after they were photographed by PW2 and whether same were promptly or immediately put back into the cabinet and locked. This Court is thus left to presume that this was done. Even in his re-examination, this gap in his evidence was not corrected, as he only said that he did not make any markings on P4A and P5A because he forgot to do so.

I am not unmindful of the evidence of PW3 who said that he had appended his signature on the newspaper wrapper P4 and P5 and he also identified same when he gave evidence in Court. From this piece of evidence it is, at the very most, only by linkage and close association of P4 and P5 with P4A and P5A that the identity of P4A and P5A could probably be established. However, I hold that in a capital charge such as this, it is unsafe to allow the identity of the drug exhibits to be established through a process of linkage or by close association or juxtaposition; rather the drug exhibits themselves ought to be marked and sealed, unless such default is negated when it is shown to the Court's satisfaction that strict conditions as to their handling at every stage (supra) has been fulfilled. Again, in a capital charge it is not permissible for this Court to presume that PW11 replaced P4A and P5A back into his cabinet and locked them soon or immediately after the photography session by PW2. Such presumptions are no substitute for clear, direct and positive evidence of it's safe custody, *a fortiori* in a capital charge.

In conclusion, for the above reasons - and solely upon my consideration of the third point taken by Counsel - I find that there is a serious gap in the chain of handling of the drug exhibits (P4A and P5A) produced in Court. In the event, I hold that the prosecution has failed to establish a *prima facie* case against the accused which, if unrebutted, would warrant his conviction. I accordingly acquit and discharge the accused without calling him to enter upon his defence.